

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

LAUSTEVEION JOHNSON.

Plaintiff,

Case No. 3:21-CV-00239-MMD-CLB

V.

GAROFALO, *et al.*,

Defendants.

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE¹

[ECF No. 35]

This case involves a civil rights action filed by Plaintiff Lausteveion Johnson (“Johnson”) against Defendants James Dzurenda (“Dzurenda”), Joseph Ferro (“Ferro”), Micaela Garofalo (“Garofalo”), Guillermo Hernandez (“Hernandez”), William Hutchings (“Hutchings”), Monique Hubbard-Pickett (“Hubbard-Pickett”), Marc LaFleur (“LaFleur”), Leo Martinez (“Martinez”), Kimberley McCoy (“McCoy”), Jennifer Nash (“Nash”), Francis Oakman (“Oakman”), and Brian Williams (“Williams”) (collectively referred to as “Defendants”). Currently pending before the Court is Johnson’s emergency motion for preliminary injunction. (ECF No. 35.) Defendants responded, (ECF Nos. 40, 41)², and Johnson replied. (ECF No. 43.) For the reasons stated below, the Court recommends that Johnson’s emergency motion for preliminary injunction, (ECF No. 35), be denied.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Johnson is an inmate currently in the custody of the Nevada Department of Corrections (“NDOC”) and is currently housed at the Northern Nevada Correctional Center (“NNCC”). Johnson was convicted on July 8, 2004, of one Category A felony and

27 2 ECF No. 41 consists of exhibits to Defendants' opposition, (ECF No. 40), and was
28 filed under seal. The Court denied Defendants' motion to seal, (See ECF No. 47).
Therefore, ECF No. 41 is now unsealed.

1 one Category B felony in Nevada state court. (ECF No. 41-2.) On July 13, 2004, Johnson
 2 was sentenced on the Category A felony to a term of life with the possibility of parole after
 3 ten years and to a minimum of eight years to a maximum of twenty years on the Category
 4 B felony, to be served consecutively. (*Id.*) On May 1, 2019, Johnson was paroled on the
 5 Category A felony. (ECF No. 8 at 8; ECF No. 35 at 12.) He started serving his sentence
 6 for the Category B felony conviction on May 2, 2019. (*Id.*)

7 On July 18, 2019, Johnson earned his high school diploma. (ECF No. 35 at 30.)
 8 Pursuant to Nevada Revised Statute (“NRS”) 209.4465, an inmate may receive good time
 9 credits toward a reduction in their sentence for earning a high school diploma.

10 On May 24, 2021, proceeding *pro se*, Johnson filed an inmate civil rights complaint
 11 pursuant to 42 U.S.C. § 1983, which was screened in accordance with 28 U.S.C. §
 12 1915A(a). (ECF Nos. 7, 8.) All claims were dismissed without prejudice. On January 24,
 13 2022, Johnson filed a motion for leave to file a first amended complaint (“FAC”). (ECF No.
 14 12.) Johnson’s motion was granted and the FAC was also screened. (ECF No. 20.) Upon
 15 screening, Johnson was allowed to proceed with two First Amendment retaliation claims.
 16 (*Id.*) The first claim is based on the allegations that Defendants Williams, Dzurenda, Nash,
 17 Oakman, and Garofolo allegedly provided a false high-risk assessment during his 2019
 18 parole hearing. The second claim is based on allegations that Defendants Ferro, Moyle³,
 19 and LaFleur failed to provide Johnson with all of the good time credits he earned by
 20 receiving his high school diploma. (*Id.*)

21 On December 27, 2022, Johnson filed the instant emergency motion for
 22 preliminary injunction. (ECF No. 35.) Johnson argues that, out of retaliation for filing
 23 grievances, Defendants did not give him the full 90 days of good time credit he earned
 24 for receiving his high school diploma. (*Id.* at 6.) Johnson argues that he is entitled to 90
 25 days of credits towards his parole eligibility date (“P.E.D.”) under NRS 209.4465. (*Id.*)
 26 According to Johnson, proper application of these good time credits would advance
 27

28 ³ Pursuant to Fed. R. Civ. P 4(m), Defendant Moyle was dismissed without prejudice
 for a failure to properly effectuate service. (ECF No. 31.)

1 Johnson's P.E.D. from May 2, 2023, to February 2, 2023. (*Id.*)

2 Defendants opposed the motion. (ECF No. 38.) Defendants argue the motion
 3 should be denied because Johnson fails to: (1) articulate that he will suffer irreparable
 4 harm if the injunction is not granted; and (2) establish a likelihood of success on the
 5 merits. (*Id.*) Defendants submit evidence they claim establishes Johnson received 90
 6 days credit towards his minimum and maximum aggregated sentences. (ECF No. 41-1 at
 7 14, 23.) Moreover, Defendants assert NRS 209.4465(8) excludes offenders convicted of
 8 class A or B felonies, like Johnson, from receiving credit towards the P.E.D. (ECF No. 40
 9 at 3-5.).

10 In his reply, Johnson argues that NRS 209.4465(8) was added after his conviction
 11 and therefore does not apply. (ECF No. 43 at 7-9.) He cites Nevada Supreme Court Case
 12 *Williams v. State Department of Corrections*, 402 P.3d 1260 (Nev. 2017), in support of
 13 his argument. (*Id.*) Additionally, Johnson argues Defendants improperly applied the
 14 credits towards his 10 years to life sentence for his conviction of the Category A felony,
 15 for which he was paroled prior to receiving his high school diploma. (*Id.* at 6-7.)

16 On January 27, 2023, the Court held an evidentiary hearing on Johnson's motion
 17 for preliminary injunction. (ECF No. 49.)

18 **II. LEGAL STANDARD**

19 Generally, the purpose of a preliminary injunction or temporary restraining order
 20 is to preserve the status quo if the balance of equities so heavily favors the moving party
 21 that justice requires the court to intervene to secure the positions until the merits of the
 22 action are ultimately determined. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).
 23 A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded
 24 as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). Instead, in
 25 every case, the court "must balance the competing claims of injury and must consider
 26 the effect on each party of the granting or withholding of the requested relief." *Winter v.*
 27 *Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) (quotation marks and
 28 citation omitted). The instant motion requires the Court determine whether Johnson has

1 established the following: (1) he is likely to succeed on the merits; (2) he is likely to suffer
 2 irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in
 3 his favor; and (4) an injunction is in the public interest. *Id.* at 20 (citations omitted).

4 Before *Winter*, courts in the Ninth Circuit applied an alternative “sliding-scale” test
 5 for issuing a preliminary injunction that allowed the movant to offset the weakness of a
 6 showing on one factor with the strength of another. See *Alliance for Wild Rockies v.*
 7 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); see also *Beardslee v. Woodford*, 395 F.3d
 8 1064, 1067 (9th Cir. 2005). In *Winter*, the Supreme Court did not directly address the
 9 continued validity of the Ninth Circuit’s sliding-scale approach to preliminary injunctions.
 10 See *Winter*, 555 U.S. at 51; see also *Alliance*, 632 F.3d at 1131. The Ninth Circuit has
 11 since found that post-*Winter*, this circuit’s sliding-scale approach, or “serious questions”
 12 test survives when applied as part of the four-element *Winter*’s test. *Alliance*, 632 F.3d
 13 at 1131-32. “In other words, ‘serious questions going to the merits’ and a hardship
 14 balance that tips sharply towards the Johnson can support issuance of an injunction,
 15 assuming the other two elements of the *Winter* test are also met.” *Id.* (citations omitted).
 16 The portion of the sliding-scale test that allowed injunctive relief upon the possibility, as
 17 opposed to likelihood, of irreparable injury to the Johnson, was expressly overruled by
 18 *Winter*. See *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

19 An even more stringent standard is applied where mandatory, as opposed to
 20 prohibitory preliminary relief is sought. The Ninth Circuit has noted that although the
 21 same general principles inform the court’s analysis, “[w]here a party seeks mandatory
 22 preliminary relief that goes well beyond maintaining the status quo pendente lite, courts
 23 should be extremely cautious about issuing a preliminary injunction.” *Martin v.*
 24 *International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984); see also *Committee*
 25 *of Cent. American Refugees v. Immigration & Naturalization Service*, 795 F.2d 1434,
 26 1442 (9th Cir. 1986). Thus, an award of mandatory preliminary relief is not to be granted
 27 unless both the facts and the law clearly favor the moving party and extreme or serious
 28 damage will result. See *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting

1 *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)).

2 Finally, the Prison Litigation Reform Act (PLRA) mandates that prisoner litigants
 3 must satisfy additional requirements when seeking preliminary injunctive relief against
 4 prison officials:

5 Preliminary injunctive relief must be narrowly drawn, extend no further than
 6 necessary to correct the harm the court finds requires preliminary relief, and
 7 be the least intrusive means necessary to correct that harm. The court shall
 8 give substantial weight to any adverse impact on public safety or the
 9 operation of a criminal justice system caused by the preliminary relief and
 10 shall respect the principles of comity set out in paragraph (1)(B) in tailoring
 11 any preliminary relief.

12 18 U.S.C. §3626(a)(2). Thus, section 3626(a)(2) limits the Court's power to grant
 13 preliminary injunctive relief to inmates. *Gilmore v. People of the State of California*, 220
 14 F.3d 987, 998 (9th Cir. 2000). "Section 3626(a)(2) . . . operates simultaneously to restrict
 15 the equity jurisdiction of federal courts and to protect the bargaining power of prison
 16 administrators-no longer may courts grant or approve relief that binds prison
 17 administrators to do more than the constitutional minimum." *Id.* at 999.

18 **III. DISCUSSION**

19 In this instance, Johnson is requesting a mandatory, as opposed to prohibitory,
 20 injunction that the Court mandate a change to how his credits were awarded, not prevent
 21 the credits from being changed. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH &*
 22 *Co.*, 571 F.3d 873, 879 (9th Cir. 2009) ("This relief is treated as a mandatory injunction,
 23 because it 'orders a responsible party to 'take action.'"') (citation omitted). As such, the
 24 standard for granting the mandatory preliminary injunction requested here is much higher
 25 than for a prohibitory injunction and will not be granted unless both the facts and the
 26 law clearly favor the moving party and extreme or serious damage will result. See *Garcia*,
 27 786 F.3d at 740 (citations omitted). The Court will address the issue of good time credits,
 28 whether Johnson can clearly show retaliation, and whether extreme or serious damage
 would result to Johnson if a mandatory injunction is not granted.

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1 **A. Retaliation Standard**

2 It is well established in the Ninth Circuit that prisoners may seek redress for
 3 retaliatory conduct by prison officials under § 1983. *Rhodes v. Robinson*, 408 F.3d 559,
 4 567 (9th Cir. 2004); *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). “Prisoners
 5 have a First Amendment right to file grievances against prison officials and be free from
 6 retaliation for doing so.” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012).

7 “A prison inmate retains those First Amendment rights that are not inconsistent
 8 with his status as a prisoner or with the legitimate penological objectives of the corrections
 9 system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Within the prison context, a viable
 10 retaliation claim has five elements: (1) a state actor took some adverse action against the
 11 inmate, (2) because of, (3) the inmate’s protected conduct, and that the action, (4) chilled
 12 the inmate’s exercise of his First Amendment rights, and (5) did not reasonably advance
 13 a legitimate correctional goal. *Rhodes*, 408 F.3d at 567–68. The adverse action must be
 14 such that it “would chill or silence a person of ordinary firmness from future First
 15 Amendment activities.” *Watison*, 668 F.3d at 1114 (quoting *Rhodes*, 408 F.3d at 568).

16 An inmate must submit evidence, either direct or circumstantial to establish a link
 17 between the exercise of constitutional rights and the allegedly retaliatory action. *Pratt v.*
 18 *Rowland*, 65 F.3d 802, 806-07 (9th Cir. 1995). “[A] plaintiff must show that his protected
 19 conduct was ‘the “substantial” or “motivating” factor behind the defendant’s conduct.’”
 20 *Brodheim*, 584 F.3d at 1271 (quoting *Soriano’s Gasco, Inc. v. Morgan*, 874 F.2d 1310,
 21 1314 (9th Cir. 1989)). The plaintiff “need only ‘put forth evidence of retaliatory motive,
 22 that, taken in the light most favorable to him, presents a genuine issue of material fact as
 23 to [the defendant’s] intent.’” *Id.* (quoting *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir.
 24 2003)).

25 To raise a triable issue as to motive, plaintiff must offer “either direct evidence of
 26 retaliatory motive or at least one of three general types of circumstantial evidence [of that
 27 motive].” *McCollum v. Cal. Dep’t of Corr. and Rehab.*, 647 F.3d 870, 882 (9th Cir. 2011)
 28 (citation and quotation marks omitted). Circumstantial motive evidence may include: “(1)

1 proximity in time between protected speech and the alleged retaliation; (2) [that] the
 2 [defendant] expressed opposition to the speech; [or] (3) other evidence that the reasons
 3 proffered by the [defendant] for the adverse . . . action were false and
 4 pretextual." *Id.* (internal citation and quotation marks omitted). However, "mere
 5 speculation that defendants acted out of retaliation is not sufficient." *Wood v. Yordy*, 753
 6 F.3d 899, 905 (9th Cir. 2014).

7 **i. Adverse Action – Application of Good Time Credits**

8 Based on the evidence and testimony of the Chief of the Offender Management
 9 Division, Kirk Widmar, provided during the evidentiary hearing, the Court finds that
 10 Johnson's good time credits were properly applied to his P.E.D. (ECF No. 49.) Widmar's
 11 testimony and Exhibits 502 and 503 (Johnson's Credit History by Sentence for his
 12 maximum and minimum terms) affirmatively establish Johnson received 90 days credit
 13 toward both his minimum and maximum aggregated sentences appropriately, pursuant
 14 to NRS 209.4465. (ECF No. 49 at Exh. 502, 503.)

15 Specifically, Exhibit 503, as explained by Widmar's testimony, reflects the Credit
 16 History for the minimum term of Johnson's current sentence for his Category B felony.
 17 (ECF No. 49 at Exh. 503.) As this document reflects, Johnson's current sentence began
 18 on May 2, 2019. In the header section of this document, it reflects that Johnson must
 19 serve 2922 days of this sentence, which is listed as "days owed." (*Id.* at p. 1.) Under the
 20 header section of this document, each "credit" item applied to Johnson's sentence is
 21 reflected. Each entry is deducted from the total 2922 days owed toward this sentence –
 22 much like a check register. (*Id.*) The very first credit entry toward Johnson's minimum
 23 sentence reflects a 90-day credit for the completion of Johnson's high school diploma.
 24 (*Id.*) Thus, the total days "owed" for his sentence were reduced from 2922 days to only
 25 2832 days. (*Id.*) Based on the deduction of these 90 days as well as all other credits
 26 earned by Johnson, his P.E.D. date was correctly calculated to be April 21, 2023. (*Id.*)
 27 As explained by Widmar, if the 90-credit was not applied, the P.E.D. would be 90 days
 28 after April 21, 2023, or sometime in July 2023. (*Id.*) Therefore, contrary to Johnson's

1 assertions, the 90 day good time credits were properly applied to his minimum sentence
 2 and in calculating his P.E.D. Thus, because the Court finds that good time credits were
 3 properly applied, Johnson cannot clearly show an adverse action.

4 **ii. Causation – Evidence of Retaliation**

5 Regardless of whether Johnson's credits were properly calculated, the Court turns
 6 to Johnson's assertion that Defendants LaFleur and Ferro denied good time credits
 7 *because* Johnson filed grievances. During the hearing, Defendants LaFleur and Ferro
 8 testified as to the retaliation claim. (ECF No. 49.) According to their testimony, Defendants
 9 LaFleur and Ferro are both caseworkers employed with the NDOC. (*Id.*) First, Defendants
 10 each testified that they were neither responsible for, nor did they, calculate or input
 11 Johnson's good time credits related to his high school diploma. (*Id.*) Next, each Defendant
 12 testified that while they do respond to grievances as part of their job duties, they could
 13 not recall specific grievances from Johnson that they responded to. (*Id.*) Finally, each
 14 Defendant affirmatively testified that they did not cause Johnson's good time credits
 15 related to his high school diploma to be misapplied. (*Id.*)

16 Based on the above, there is no evidence in the record showing that Defendants
 17 LaFleur or Ferro were responsible for calculating or applying good time credits. Further,
 18 even if the Court were to assume that Johnson's credits for his high school diploma were
 19 misapplied, and that these Defendants personally misapplied these credits—there is no
 20 evidence that the misapplication was *because of* Johnson filing grievances or in retaliation
 21 for Johnson filing grievances. See *Rhodes*, 408 F.3d at 567–68. Because the facts here
 22 do not clearly show that Johnson was retaliated against, the Court cannot issue a
 23 mandatory preliminary injunction. See *Garcia*, 786 F.3d at 740 (citations omitted).

24 **B. Irreparable Harm**

25 Finally, in the context of a mandatory preliminary injunction, Johnson must also
 26 show that extreme or very serious harm *will* occur if an injunction is not issued. *Anderson*,
 27 612 F.2d at 1115 (citations omitted) (emphasis added). As such, “[t]here must be a
 28 ‘sufficient causal connection’ between the alleged irreparable harm and the activity to be

1 enjoined, and showing that ‘the requested injunction would forestall’ the irreparable harm
 2 qualifies as such a connection.” *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886
 3 F.3d 803, 819 (9th Cir. 2018) (citing *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981–
 4 82 (9th Cir. 2011)). Here, the potential irreparable harm is that Johnson would be
 5 incarcerated for longer than required. Remaining in prison longer than required to serve
 6 one’s sentence is a deprivation of his liberty that cannot be remedied after the fact.
 7 Therefore, the question in this case is whether receiving the credits towards his P.E.D.
 8 would speed up his *actual release date* if the credits were misapplied. If so, then Johnson
 9 undoubtedly would suffer irreparable harm. However, if receiving the credits towards his
 10 P.E.D. only moves up the date of when he *may* be granted parole, the question becomes
 11 whether Johnson is entitled to an earlier parole hearing date and whether ultimate
 12 determination to grant Johnson parole on his P.E.D. is a discretionary decision by the
 13 Parole Board.

14 NRS 213.10705 states “[t]he legislature finds and declares that the release or
 15 continuation of a person on parole or probation is an act of grace of the State. *No person*
 16 *has a right to parole or probation*, or to be placed in residential confinement, and it is not
 17 intended that the establishment of standards relating thereto create any such right or
 18 interest in liberty or property or establish a basis for any cause of action against the State,
 19 its political subdivisions, agencies, boards, commissions, departments, officers or
 20 employees.” (emphasis added). This establishes that regardless of when Johnson
 21 reaches his P.E.D., he is not automatically paroled. The Parole Board still must decide
 22 whether Johnson will actually be paroled.

23 At the evidentiary hearing on January 27, 2023, Defendants represented that
 24 parole is an act of grace by the Parole Board and having a parole hearing does not
 25 automatically mean an inmate will be paroled after the hearing. (ECF No. 49.)
 26 Additionally, Defendants represented that Johnson has already been scheduled for the
 27 earliest parole hearing possible. (*Id.*) Therefore, regardless of whether Johnson’s credits
 28 were properly applied or whether he was retaliated against, Johnson cannot show that

1 extreme or very serious harm will occur if a preliminary injunction is not imposed.
2 Accordingly, for all these reasons, the Court cannot issue a mandatory preliminary
3 injunction in this case.

4 **V. CONCLUSION**

5 For good cause appearing and the reasons stated above, the Court recommends
6 that Johnson's motion for preliminary injunction, (ECF No. 35), be denied.

7 The parties are advised:

8 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
9 Practice, the parties may file specific written objections to this Report and
10 Recommendation within fourteen days of receipt. These objections should be entitled
11 "Objections to Magistrate Judge's Report and Recommendation" and should be
12 accompanied by points and authorities for consideration by the District Court.

13 2. This Report and Recommendation is not an appealable order and any
14 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
15 District Court's judgment.

16 **IV. RECOMMENDATION**

17 **IT IS THEREFORE RECOMMENDED** that Johnson's motion for preliminary
18 injunction, (ECF No. 35), be **DENIED**.

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20 **DATED:** January 27, 2023.

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22 **UNITED STATES MAGISTRATE JUDGE**

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